STATE OF MICHIGAN

COURT OF APPEALS

TAMMY SHOEMAKER, Plaintiff-Appellant,	UNPUBLISHED August 8, 2013
v	No. 311345 Kent Circuit Court
RIDGEVIEW INDUSTRIES, INC., and DOUGLAS DYKSTRA, Defendants-Appellees.	LC No. 11-04195-CD

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Plaintiff Tammy Shoemaker appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10) with respect to her claims of quid pro quo sexual harassment and hostile work environment, which were brought pursuant to the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*. We affirm.

Defendant Douglas Dykstra ("Dykstra") was Vice-President of Operations for defendant Ridgeview Industries, Inc. ("Ridgeview"). Plaintiff was employed by Ridgeview in a customer service position. Plaintiff alleged that Dykstra made numerous inappropriate comments to her regarding her body and the outfits that she wore to work, that he made other remarks to her of a sexual nature, and that he would leer at her and look down her shirt. There was also an allegation that Dykstra propositioned plaintiff while they attended a business function in Alabama; however, plaintiff later conceded that the event occurred outside the applicable three-year statute of limitations. See MCL 600.5805(10) (general three-year statute of limitations); *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284-285; 696 NW2d 646 (2005) (applying three-year statute of limitations to the CRA). Plaintiff further alleged that after she rejected Dykstra's sexual communications and conduct, her workload greatly increased. Although plaintiff acknowledged that personnel cuts had increased everyone's workload, she asserted that she bore a heavier and unequal share of the increased workload, making the work environment intolerable. Plaintiff eventually quit after giving a two-week notice; however, she claimed that she was constructively discharged because of the hostile work environment. Plaintiff did attempt to retract her notice and stay on with Ridgeview, but the effort was rejected.

Defendants presented evidence that employee workloads increased due to cutbacks caused by economic conditions, that plaintiff was treated no differently than others with respect

to the increase in hours and workload, that it was plaintiff's engagement in non-productive activities during the workday, e.g., lengthy personal phone calls and longer than average breaks, that caused her to spend extra time at work, and that Dykstra had no involvement whatsoever in her work assignments. Ridgeview conducted an investigation after it received a demand letter from plaintiff's counsel several months after plaintiff stopped working for Ridgeview, which, according to Ridgeview, was the first time the company had heard allegations of sexual harassment voiced by plaintiff. Plaintiff claimed that she had informed her direct supervisor, Jim Bagley, about the sexual proposition in Alabama, following her return home from the business trip. But plaintiff acknowledged that she never mentioned anything about "sexual" harassment to company personnel thereafter during the course of her employment. Indeed, in an extensive letter emailed by plaintiff to Ridgeview's owner, a personal friend, after her employment ended, plaintiff never once made a claim that she had been sexually harassed while employed by Ridgeview.

With respect to Ridgeview's investigation into the matter, the company concluded, as reflected in an investigation summary, that the evidence squarely contradicted plaintiff's claims. The investigation summary did concede that Dykstra "admitted seeing down [plaintiff's] shirt from time to time," but he "denied leering or staring at her, or consciously trying to look down her shirt." According to the investigation summary, Dykstra reported that plaintiff "often wore low cut tops and leaned forward during conversations, making it hard not to notice and look." The investigation summary further indicated that employees who worked in plaintiff's department reported that she "frequently wore tops that were very low cut and displayed enough of herself that it was difficult not to look." The investigation summary noted that Bagley was often uncomfortable and embarrassed when plaintiff would wear low cut tops and expose her cleavage by leaning forward and bending over.

The trial court summarily dismissed plaintiff's quid pro quo sexual harassment claim, finding that she failed to create an issue of fact with respect to whether there was a causal connection between plaintiff's rejection of Dykstra's communications and conduct and the increase in her workload. The trial court also summarily dismissed plaintiff's hostile work environment claim, finding, as a matter of law, that the work environment had not been sufficiently severe or pervasive to support the claim.

Plaintiff argues on appeal that the trial court erred in dismissing the two CRA claims, where the evidence, when viewed in a light most favorable to plaintiff, was sufficient to create issues of fact on all of the elements of the causes of action.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). Also reviewed de novo are issues of statutory interpretation. *Feyz v Mercy Mem Hosp,* 475 Mich 663, 672; 719 NW2d 1 (2006). MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co,* 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the

nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(4) and (5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. A court may only consider "substantively admissible evidence actually proffered" relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court is not permitted to assess credibility, to weigh the evidence, or to determine the facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

We initially note that, in opposing defendants' motion for summary disposition, plaintiff relied almost entirely on her affidavit that was attached to her brief in response to the motion, and the affidavit consisted of only five averments, which included broad conclusory statements, e.g., that she had been "sexually harassed." The affidavit bootstrapped all of the facts contained in plaintiff's summary disposition response brief, incorporating by reference those facts and averring that said facts were true. The affidavit did not include an express statement that it was made on personal knowledge. We question whether the affidavit complied with the requirements of MCR 2.119(B)(1)(a) and (b), which court rule governs the form of affidavits, and which requires them to be "made on personal knowledge" and to "state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion." This Court has stated that "mere conclusory allegations within an affidavit that are devoid of detail are insufficient to create a question of fact." *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006).[1] For purposes of this opinion, we shall assume for the sake of argument that the affidavit, except for the conclusory claims of sexual harassment, was valid and can be considered, including the averment incorporating by reference the facts set forth in plaintiff's summary disposition response brief.

Plaintiff brought her claim for quid pro quo sexual harassment under the CRA, which provides that "[a]n employer shall not . . . discharge[] or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex[.]" MCL 37.2202(1)(a). An "employer" is defined as "a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a). Discrimination predicated on "sex" is defined in MCL 37.2103(i), which provides in part:

> Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and

[1] The trial court rejected plaintiff's affidavit on the basis that it contained "conclusory allegations and was devoid of detail," and because it conflicted with her deposition testimony. "It is well settled that a party may not create an issue of fact by submitting an affidavit that contradicts prior deposition testimony." *Atkinson v Detroit*, 222 Mich App 7, 11; 564 NW2d 473 (1997). We, however, found no conflict between the deposition testimony and the affidavit.

> other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> > (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . . .
> >
> > (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment[.]

Sexual harassment that falls into either one of "these subsections is commonly labeled quid pro quo harassment." *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000). The Michigan Supreme Court analyzed this statutory language in *Chambers*, *id.*, stating:

> In order to establish a claim of quid pro quo harassment, an employee must, by a preponderance of the evidence, demonstrate:
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> > "(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." [Citation omitted.]

Given the trial court's ruling disposing of this claim on a causation basis, we begin by examining the second element of quid pro quo sexual harassment. Viewing the evidence in a light most favorable to plaintiff, she rejected and did not submit to or embrace Dykstra's sexual communications and conduct, and her hours were later increased from a regular ten-hour workday to a thirteen-hour workday. Additionally, in her summary disposition response brief, plaintiff stated, "Interestingly, no one else in her department was forced to work these unreasonable hours – only the woman who declined Mr. Dykstra's advances." The department that plaintiff worked in at Ridgeview lost three of its employees, and rather than replacing them, the work was distributed amongst the remaining employees in the department. In a letter to Ridgeview's owner, plaintiff stated that when the first employee was fired, his workload was divided between the two remaining department employees, plaintiff and another individual, but plaintiff claimed that the split was not done evenly. Also, during a two-week period that Jim Bagley was away on medical leave, plaintiff claimed that "a certain person started to single [her] out and verbally reprimand [her] and criticize everything that [she] did." Ostensibly, this was a reference to Dykstra, and the record does contain email communications involving Dykstra relative to the day that plaintiff gave her two-week notice, wherein one email Dykstra stated, "Before 9 people were copied in bold letters, this would have been good to check out with just a few – this sent out a panic wave and caused some unneeded activities." This apparently was in response to an email sent by plaintiff that the company was not going to timely receive "wire" from a vendor because of some type of mistake.

Even construing all of the relevant evidence in a light most favorable to plaintiff, her claim of quid pro quo sexual harassment fails because she did not submit documentary evidence sufficient to show that there was a genuine issue of material fact with respect to the causation

component of the second element. The Court in *Chambers* stated that "the sine qua non of a quid pro quo harassment claim is a decision affecting the plaintiff's employment." *Chambers*, 463 Mich at 317. A plaintiff must demonstrate a tangible employment action that is causally related to the submission to or rejection of the sexual conduct or communication. MCL 37.2103(i)(*ii*); *Chambers*, 463 Mich at 310. Plaintiff failed to make such a showing as a matter of law.

There was indeed evidence of a decision affecting plaintiff's employment, where there is essentially no dispute that her workload increased when Ridgeview decided to terminate and not replace co-employees in plaintiff's department. Plaintiff never suggested that personnel were eliminated and then not replaced because of her rejection of and failure to submit to Dykstra's conduct and communications. Rather, the gist of her quid pro quo sexual harassment claim was that she bore a heavier and unequal share of the increased workload, requiring her, and no one else, to work ridiculously long hours every day. Plaintiff attributes this inequality or discrimination to payback by Dykstra for rejecting his sexual conduct and communications. Defendants maintain, however, that she was not treated any differently and that her longer hours in the office were the result of her engaging in various "non-productive activities" during the workday. Plaintiff did not submit any documentary evidence that challenged, directly and with particularly, defendants' evidence and argument pertaining to non-productive activities as being the cause of her long work days. For example, plaintiff did not aver in her affidavit, or state in her summary disposition response brief, that, contrary to defendants' evidence, she took normal-length lunch breaks and did not chat on the phone excessively with friends and family.

Moreover, defendants presented evidence that Dykstra never made changes to plaintiff's workload, that all of her customer assignments were made by Bagley, and that no one changed those assignments when Bagley was on his leave of absence. Plaintiff did maintain in the summary disposition response brief that only the woman who declined Dykstra's advances – herself – was forced to work unreasonable hours. The brief also asserted that "Dykstra used his authority to dramatically, and unfairly, increase [plaintiff's] work load[.]" Although this claim specifically connected Dykstra to her workload increase, which in conjunction with the evidence of sexual conduct and communications and rejection thereof could perhaps give rise to an inference of a causal connection, the claim, like much of plaintiff's case, is exceptionally vague; there are no developed factual details. Plaintiff did not present specific evidence indicating that Dykstra was involved in making customer assignments, that workload increases were not solely within the purview of Bagley's authority, that Dykstra directed or forced Bagley to increase workloads, that Dykstra, despite his title, had the particular power to do so under company rules, or that Dykstra changed assignments when Bagley was on leave. Indeed, there was no documentary evidence submitted by plaintiff that set forth any information regarding Ridgeview's structure in relationship to employment duties and the assignment of workloads. We hold that it was insufficient to merely state in broad terms that Dykstra used his authority to dramatically and unfairly increase plaintiff's workload absent any elaboration, explanation, or details.

Furthermore, plaintiff's claim that "a certain person started to single [her] out and verbally reprimand [her] and criticize everything that [she] did" is not even tied to an unfair workload increase, which served as the predicate for her quid pro quo sexual harassment claim.

On the basis of a failure to create a genuine issue of material fact with respect to causation, we affirm the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) on the quid pro quo sexual harassment claim.

Plaintiff brought her hostile work environment claim pursuant to the CRA, and more particularly MCL 37.2103, which provides in relevant part:

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> . . .
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> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

The Michigan Supreme Court read and interpreted this statutory provision, in conjunction with MCL 37.2202(1)(a) (employer shall not discriminate with respect to conditions and privileges of employment because of sex), as requiring proof of the following elements to support a claim of hostile work environment sexual harassment:

> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;
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> (3) the employee was subjected to unwelcome sexual conduct or communication;
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> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
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> (5) respondeat superior. [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

All five elements must be present to prove a prima facie case against the employer, where only the first four need be present to prove a prima facie case against the offending employee.

We first find that some of the evidence related to Dykstra leering at plaintiff cannot be considered, e.g., the observations of a maintenance manager, because there is no evidence showing that plaintiff became aware of the conduct observed by others prior to the end of her employment. In *Langlois v McDonald's Restaurants of Mich, Inc*, 149 Mich App 309, 317; 385 NW2d 778 (1986), this Court ruled that a "plaintiff cannot rely upon incidents of sexual harassment of which she was unaware to establish that she was subjected to a hostile work environment for purposes of the [CRA]."

Our Supreme Court has stated that a hostile work environment is created by unwelcome conduct when "a reasonable person, in the totality of circumstances, would have perceived the

conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile or offensive employment environment." *Quinto*, 451 Mich at 369. To aid in the evaluation of the circumstances, the Court stated that the factfinder should examine the type, severity, and duration of the conduct to determine if a hostile work environment had been created. *Id.* at 370.

In accordance with the aforementioned rules, we must determine if the comments and conduct were sufficiently severe and pervasive in type and duration as to allow a jury to examine the issue or whether they fail as a matter of law. We hold that plaintiff failed to submit documentary evidence clarifying ambiguities and providing details with respect to the frequency and timing of the conduct and communications of which plaintiff complained. The language plaintiff used to describe the incidents with Dykstra failed to identify specific dates or even approximate times. With respect to the alleged proposition in Alabama that was supposedly communicated to Bagley after plaintiff returned home from the trip, she conceded, as mentioned earlier, that the event occurred outside the period of limitations.[2] Plaintiff averred in her affidavit that she was sexually harassed on a regular and consistent basis from the time of the Alabama trip until the spring of 2010 when she quit, and the summary disposition response brief alluded to the same time period relative to Dykstra's other conduct and communications. We can only speculate with respect to what comments and conduct fell inside the limitations period and what plaintiff meant by the terms "regular and consistent." Moreover, the specific and most damning comments, i.e., how certain outfits enhanced plaintiff's curves, how other outfits hid the best parts, and the "good hiney" comment, were not given a particular timeframe, nor was it specified how often these particular remarks were made, which is relevant in determining whether the work environment was sufficiently hostile. As to alleged comments about position preference and things to do in a hot tub, no timeframe was given, nor was there any elaboration regarding the context of the remarks. And aside from simply stating that Dykstra made the comments "[o]n many occasions," we have no idea how often the comments were actually expressed.

Another defect with plaintiff's hostile work environment claim is the lack of documentary evidence expressing the emotional or mental impact of Dykstra's sexual communications and conduct. She never even accused Dykstra of sexual harassment in her discussions with Ridgeview's human resources director or its owner at the time that she left Ridgeview, and she even asked for her job back. Plaintiff's complaints about her work environment and the turmoil it was creating in her life related to being unfairly overworked, not to Dykstra's sexual comments and conduct, and to the extent that being unfairly overworked was part and parcel of the sexual harassment aspect of the hostile work environment claim, there again was the lack of evidence connecting Dykstra to the workload increase.

[2] In Bagley's affidavit, he denied that plaintiff ever informed him of the purported sexual advance in Alabama, and he averred that she never told him about any sexual harassment being committed by Dykstra during her employment.

The ambiguity in plaintiff's version of events and her inability to properly establish a useful timeline regarding the comments and conduct, along with the general failure to set forth detailed facts showing a true hostile work environment or one connected to Dykstra, require us to affirm the trial court's grant of summary disposition on the hostile work environment claim.

Furthermore, the hostile work environment claim with respect to Ridgeview fails on the additional basis that respondeat superior was not established. In order for the respondeat superior element to be established by a plaintiff, the plaintiff needs to show that the employer had notice of the hostile work environment. *Sheridan v Forest Hills Pub Schs*, 247 Mich App 611, 621; 637 NW2d 536 (2001). This Court made clear that notice means that the employer knew or should have known of the sexual harassment. *Id.* To establish notice, a plaintiff needs to complain to higher management, and in *Sheridan*, the plaintiff failed to satisfy this notice requirement by "not complain[ing] about the harassment to higher management." *Id*. at 622. The Court stated, "We define this term to mean someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." *Id.* Applying this definition to the case at bar, plaintiff was required to have reported her claims to either someone above Dykstra in the chain of command, like the owner, or to the human resources department, as it would have "actual authority to effectuate change in the workplace." *Id.* at 623. There was no evidence of compliance with this requirement.

Finally, plaintiff argues that the trial court improperly granted the motion for summary disposition as to Dykstra, given that the CRA allows for an individual to be held liable for acts of sexual harassment. Plaintiff's argument is entirely without merit. The trial court did not summarily dismiss Dykstra individually on the basis that the CRA precluded individual liability; the court made no such finding and the CRA does not preclude individual liability. The trial court summarily dismissed the claims against both defendants for failure to establish a genuine issue of material fact on all of the requisite elements of the causes of action. The substance of the trial court's ruling was not limited to the claims against Ridgeview. Accordingly, plaintiff's argument fails.

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Henry William Saad
/s/ Deborah A. Servitto